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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented For Review

1. Whether active interchange with political officials as part of a legislative lobbying program, and traditional political tactics and negotiation not otherwise unlawful, constitute a "conspiracy" between these officials and private parties in violation of Section 1 of the Sherman Act.

2. Whether, and to what extent, there is vitality to the so-called "co-conspirator exception" to the *Noerr-Pennington* doctrine.

Parties to the Action

The general partners of Petitioner Gulf Coast Cable Television Company are Clive Runnels, Warner Amex Cable Communications, Inc., and Warner Amex Cable Communications Company (arising out of a joint venture between Warner Communications Inc., a public company, and American Express Company, a public company). The limited partners are Louis K. Adler, David Askanase, J. Evans Attwell, Morton A. Cohn, Duncan Community Partnership Ltd. (John H. Duncan, General Partner), W.S. Farish III, Gerald D. Hines, R.A. Horne, William R. Lloyd, Jr., Ralph S. O'Connor, Edward Randall III, Eliza Lovett Randall, Katharine Risher Randall, Corbin J. Robertson, Rotan Mosle Inc. (Gary L. Wood, Vice President, General Counsel and Secretary), Clive Runnels, Mrs. R.E. Smith, R.A. Seaie, Jr., Co-Trustee of the following trusts created u/w/o R.E. Smith: Bobby Smith Cohn Trust, Sandra Smith Dompier Trust, Elizabeth Kirby Allen Trust, Anne Lindsay Cohn Trust, Courtney Lyle Cohn Trust, Sandra Ann Austin Trust, Susan Bellamy Austin Trust, Stacey Elizabeth Austin Trust, Shelly Marie Austin Trust. Gulf-Coast Bellaire Cable Television is the only subsidiary of Gulf Coast Cable Television Company.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Gulf Coast Cable Television Co. ("Gulf Coast") asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, entered in this proceeding on July 16, 1984, as to which rehearing was denied by that court on September 17, 1984.

Opinions Below

The per curiam order of the *en banc* Fifth Circuit Court of Appeals denying Gulf Coast's petition for rehearing, and the dissenting opinion (Clark, C.J.), are reported at 741 F.2d 766. (A. 1)[1] The majority opinion of that court (Garza, J.), the concurring opinion (Higginbotham, J.), and the dissenting

1 References to the opinions below will be cited to the separately-bound Appendix to this petition.

opinion (Clark, C.J.), are reported at 735 F.2d 1555. (A. 3) The majority opinion of a panel of that court (Garza, J.), and the dissenting opinion (Clark, C.J.), are reported at 700 F.2d 226. (A. 39) The opinion of the United States District Court for the Southern District of Texas (Bue, D.J.) is reported at 519 F. Supp. 991. (A. 64)

Jurisdiction

The *en banc* judgment of the Court of Appeals was entered on July 16, 1984. A timely petition for rehearing was denied on September 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute and Constitutional Provision Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case arises from the political process through which officials of the City of Houston, Texas awarded cable television franchises in 1978. Unsuccessful in obtaining a franchise, respondent Affiliated Capital Corp. ("Affiliated") sued petitioner Gulf Coast, one of five successful applicants, as well as Houston's Mayor and the city itself. The Fifth Circuit approved a $6.3 million antitrust treble damage award in favor of Affiliated. In so doing, it held that traditional lobbying activities lose their *Noerr-Pennington* antitrust immunity whenever government officials "active[ly] participat[e]" (A.117) with the private parties.

The Facts

In 1973, the City of Houston granted a single franchise to provide cable television service for the entire city. Acting pursuant to state and municipal law, Gulf Coast, an unsuccessful applicant for that franchise, organized a referendum among Houston voters, who expressed their unhappiness and decisively rejected the unitary grant. (A. 4)

By 1978, as constituent pressure for cable television mounted, the Mayor of Houston and City Council sought to avoid repeating the 1973 fiasco. In formulating a franchising plan less vulnerable to revocation by referendum, Mayor James McConn and the City Council necessarily were responsive to a number of political factors. They decided that minority participation was essential, that qualified local applicants would be favored, and that several franchises would be granted, each covering a different portion of the city. (A. 4-5)

Initially, four firms, including Gulf Coast, were among those submitting applications, and the city made it known that it did not relish having to choose one or more at the expense of the others. At the urging of the Mayor, the companies sought to draw up geographically complementary proposals that together

would cover the entire city. When Affiliated filed a belated application for a portion of the area requested by Gulf Coast, Mayor McConn advised Affiliated to seek a franchise elsewhere in the city. Gulf Coast already had reduced the area it proposed to wire so as not to conflict with the application of still a fifth company controlled by a politically influential attorney, since the Mayor had suggested the Council might reject Gulf Coast's entire application if that conflict remained. (A. 5-6, 12-13 n.5)

The parties could not work out complementary proposals incorporating Affiliated, and the city thus was forced to choose between competing applicants. The courts below found (and found as an antitrust violation) that in making the choice, the Mayor and Council were actuated not by "neutral" economic or other criteria related to the applicants' qualifications, but by overt political considerations. Thus, the courts below pointed to the fact that the city ignored the recommendations of (and dismissed) its retained expert, which were viewed as out of touch with political realities. (A. 6-8) And in what the lower courts seemingly viewed as key evidence of defendants' antitrust liability, the Mayor testified:

> Q. You didn't want to step on anybody's political toes, did you?
>
> A. Not if I could avoid it.
>
> Q. You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?
>
> A. Not if I could avoid it.
>
> Q. And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreement, isn't that correct?
>
> A. Yes, generally that is correct, yes, sir.
>
> Q. And isn't that what you wanted to happen?
>
> A. That would have been beautiful, if it could have happened that way.
>
> Q. But when it didn't happen and you had to make the choice between Southwest Houston [Affiliated's

named applicant for the franchise] and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?

A. Yes, sir. I don't know if I said that, but I'll say it now.

(A. 14 n.5, 83-84)

Although the lower courts failed to note it, Affiliated did not hesitate to flex its own substantial political muscle. For example, Affiliated's principal, the Democratic State Chairman, and its attorney had tried to "pressur[e] . . . [one Councilman] into voting for" Affiliated's proposal, impressing upon him "that I owed them something and it was time for me to pay up by voting for their franchise."[2]

Despite these efforts, Affiliated's submission was rejected and the five applicants with the complementary proposals were enfranchised. (A. 8) This time, there was no referendum to overturn the decision in the political arena. Instead, Affiliated filed this antitrust suit to win in court the victory it was denied in the City Council.

Proceedings Below

By special interrogatories, the ju y was presented with two conspiracies allegedly violative of Section 1 of the Sherman Act. It found that the "boundary" agreement to divide the city into a number of non-overlapping areas was not an unreasonable restraint of trade. However, it did find a separate conspiracy composed of the successful applicants, the Mayor, and the city to exclude Affiliated from the competition for franchises, and awarded Affiliated damages of $2.1 million (trebled to $6.3 million). (A. 8-9, 67)

The district court granted judgment notwithstanding the verdict on the ground that there was no evidence that plain-

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2 Testimony of Councilman Judson Robinson, reproduced in the Appendix filed below by Gulf Coast, pp. 76, 79.

tiff's injury was caused by anything other than the boundary agreements, which the jury had found not to be unlawful. (A. 86-88) On appeal, Affiliated voluntarily dismissed the city as a defendant. A divided Fifth Circuit panel reversed the district court and reinstated the jury verdict, holding that the case involved a territorial market division *per se* violative of the Sherman Act. (A. 39)

On rehearing *en banc*, the Fifth Circuit again reversed the district court, but on a basis different from the panel's *per se* ruling. Despite a vigorous dissent by Chief Judge Clark (joined by judges Reavley and Jolly), the majority held that there was sufficient independent evidence to connect the plaintiff's failure to receive a franchise with a conspiracy between the successful applicants and city officials found by the jury to exclude competitors. It also held the Mayor immune from antitrust liability, although it said that "ruling does not effect his status as a conspirator." (A. 29)

Gulf Coast argued at every stage that it was protected by the *Noerr-Pennington* doctrine, which exempts from antitrust liability joint efforts to influence governmental action, regardless of anticompetitive purpose or effect. The Fifth Circuit rejected that argument. It adopted and approved (A. 24) the district court's opinion on this issue, which had applied the so-called "co-conspirator exception" to *Noerr-Pennington*. It held *Noerr-Pennington* immunity unavailable because the city officials had "actively conspired" with the private parties seeking governmental action. (A. 120)

The conduct of the Houston officials that was held "conspiratorial" was not such in any economic sense—there was no bribery, no splitting of franchise fees with the officials, and no secret ownership in any of the private firms by any official. Nor was any of the officials' conduct unlawful independent of the asserted "conspiracy." Instead, the official conduct found offensive consisted only of "vigorous involvement" (A. 24), "active participation" (A. 117), and "orchestration by public officials" (A. 117)—all of a wholly political nature. Political

give-and-take thus formed the gravamen of the officials' "involvement" in the conspiracy.

On Gulf Coast's further petition for rehearing, the Court of Appeals, in a *per curiam* decision, denied the petition. (A. 1) Once again, Chief Judge Clark, joined by the same colleagues, dissented. The dissent called the *en banc* majority's opinion "wrong, wrong, wrong." (A. 2)

REASONS FOR GRANTING THE WRIT

This case raises important questions for the due administration of the federal antitrust laws and their relationship to government petitioning and processes. The vitality and scope of the so-called "co-conspirator exception" to *Noerr-Pennington*, applied by the courts below, has never been directly addressed by this Court; the concept has now created a conflict in the circuits, has divided the lower courts generally, and has engendered severe scholarly criticism.

In this case, a tenuous "conspiracy" concept previously invoked only to avoid summary judgment has been used to impose antitrust liability—apparently for the first time[3]—for joint petitioning activity otherwise immune under *Noerr-Pennington*. The decision below would substantially abrogate *Noerr-Pennington*; indeed, it paradoxically exposes private citizens to the greatest risk of antitrust liability when their petitioning succeeds in engaging public officials in extensive dialogue in the political arena. The decision below is bound to stimulate new litigation against private persons and public bodies, in which federal antitrust courts and pre-trial discovery will focus on, and intrude into, the motives and activities of state and local legislators and other officials.

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3 *See* P. Areeda, *Antitrust Law* ¶ 203.3a (Supp. 1982). Research has uncovered no other reported decision imposing liability under the co-conspirator exception.

I

THERE IS CONFLICT AND INCONSISTENCY IN THE CIRCUITS.

In *Noerr*[4] and *Pennington*[5] this Court firmly settled that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670.

One passing comment in *Pennington*, however, spawned the "co-conspirator exception" and the substantial controversy that surrounds it. The Court said that the Secretary of Labor's action in setting a minimum wage "was the act of a public official who is not claimed to be a co-conspirator." 381 U.S. at 671. The Court did not elaborate. The Court mentioned this "exception" on only one other occasion, in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Again in passing, and without elaboration, the Court said "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust violation." *Id.* at 513.[6]

This "exception" to *Noerr-Pennington* has now created a conflict in the circuits. The Fifth Circuit, in this case, found an antitrust conspiracy in the officials' active involvement in petitioner's lobbying activities.

But the Seventh Circuit specifically rejected the co-conspirator exception on facts strikingly similar to those at bar. In *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), an unsuccessful applicant for a cable television

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4 *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

5 *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

6 Two cases were cited by the Court, but as Professor Fischel has noted, "[t]he two cases cited in support of this proposition are of questionable authority." D. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 114 (1977).

franchise brought an antitrust action against, among others, the company that received the franchise, the Mayor of Rockford, and a city alderman. The Mayor and the alderman had

> agreed with two of the corporate-officer defendants to use their best efforts to prevent plaintiff from getting a franchise, and "in exchange" each official was given "a substantial sum" as a campaign contribution.

Id. at 223. The City Council also had disregarded the recommendation of its own License Committee and awarded the franchise to defendant rather than to plaintiff because of " 'pressure brought on the Council by [the Mayor]' acting pursuant to the [above] agreement." *Id.*

The Seventh Circuit ruled for the defendants and declared:

> A holding that participation by members of the legislative body to the extent alleged here rendered the *Noerr* doctrine inapplicable to a campaign to induce legislative action, would . . . "be tantamount to outlawing all such campaigns" [citing *Noerr*].

Id. at 230. It would "abrogate the *Noerr* doctrine" to hold that a Sherman Act violation results when a legislator actively supports the cause of petitioners who would otherwise be protected by *Noerr-Pennington*:

> [W]e can find no rational basis in the authorities or plaintiff's argument for holding that such participation by a member of the legislative body as is here alleged should cause the Sherman Act to apply to an effort to induce governmental action that is otherwise protected by *Noerr*. Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Id.

Although the district court below in this case tried to distinguish *Metro Cable*, the cases are not meaningfully distinct. The district court merely said that the facts here "exceed" those in *Metro Cable* because the "public official and a governmental entity actively conspired with private participants in violations of the Sherman Act." (A. 120)[7] But the court did not identify the alleged "excess" nor did it explain why any such excess, if it could be identified, would vitiate *Noerr-Pennington* immunity.

Thus, the decision below is analytically in direct conflict with the Seventh Circuit's decision in *Metro Cable*.

More generally, the "co-conspirator exception" has been a source of substantial difficulty and inconsistency in the circuits since it first appeared twenty years ago. For example, in the same year the Seventh Circuit decided *Metro Cable*, the Third Circuit stated a contrary view. It said that when a complaint "goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable." *Duke & Co.* v. *Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975).

In contrast, the District of Columbia Circuit has expressed doubt whether there is anything at all to what it called the "line of dicta" forming the co-conspirator exception. *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 267 n.16 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1981). The court in that case quoted Professor Fischel's judgment that "in most cases the co-conspirator exception is unworkable and should not be recognized," *id.* at 264 n.11, a

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7 A later Seventh Circuit decision relied upon by the district court here (A. 111-12) never mentioned the "co-conspirator exception." *Kurek* v. *Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

conclusion echoed by other commentators. *See, e.g.*, R. Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 Ariz. St. L.J. 279, 301 ("because of the ephemeral and inherently unworkable nature of the exception, it should not be recognized"); E. Kintner & J. Bauer, *Antitrust Exemption for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C.D. L. Rev. 549, 586-87 (1984) ("In one sense, by adopting the policy or undertaking the conduct sought by the private party, the officials participate in every conspiracy.").

The Eighth Circuit, in turn, has twice refused to recognize a co-conspirator exception to *Noerr-Pennington*. In *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), there was evidence of an agreement between the private defendants and city officials to delay construction of plaintiff's project. Plaintiff contended that the participation of government officials vitiated *Noerr-Pennington* immunity. But the court expressly declined to base its decision upon the co-conspirator exception, noting the criticism by the Seventh Circuit in *Metro Cable*. In *First American Title Co.* v. *South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984), *Noerr-Pennington* immunity also was applied despite governmental involvement with the private petitioners. The Eighth Circuit again cited *Metro Cable* and quoted Professor Fischel's condemnation of the exception as "unworkable." *Id.* at 1446.

Certiorari should be granted in this case so that this Court may address the "co-conspirator exception" squarely for the first time, clarify its scope, and thereby settle the confusion and divergence in the circuits. Although some courts have held that even patently illegal efforts to influence government are not cognizable under the Sherman Act,[8] the Court may con-

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8 *See, e.g., Schenley Industries, Inc.* v. *New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872 (D.N.J. 1967); *Cow Palace, Ltd.* v. *Associated Milk Producers, Inc.*, 390 F. Supp. 696 (D. Colo. 1975).

clude that the exception has validity to the extent the participating official has a direct financial interest in the result he seeks—for example, if he is bribed, or if he owns property that would be favorably affected. *See* Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847, 856-57 (1968). No such situation, of course, is present in this case.

II

THE DECISION BELOW IS ERRONEOUS AND WILL HAVE IMPORTANT, FAR-REACHING CONSEQUENCES.

The decision below should be reviewed by this Court because it threatens to abrogate *Noerr-Pennington* and to spawn antitrust lawsuits that would inappropriately enmesh the federal courts in state and local political processes.

A.

In allocating cable television franchises, the Houston City Council was performing a legislative function, as the district court correctly recognized. (A. 100 n.21) The Council, a political body, and the Mayor, a political creature, made their decision in a political manner, rather than according to an economist's notion of welfare maximization or, as the majority below obviously would have preferred, on the basis of competitive bidding. Minority participation was thought desirable, local ownership was preferred, and firms with political clout were favored—and no bones were made about it. In addition to the Mayor's testimony quoted above at pages 4-5, a number of Councilmen testified that they would have voted to enfranchise Affiliated provided Gulf Coast was satisfied as well. (A. 14 n.5) When forced to decide between the two firms, political considerations prevailed.

It was clearly a distaste for the extent of the political activity, and for such "unwise" governmental decision-mak-

ing, that underlies the majority decision below. The court below inconsistently predicated liability both upon the city's "abdicat[ion]" (A. 5) of its decision-making role to the private parties, and upon its too-active "involvement" (A. 24) in the process. But as to both, the opinions below focus on the nitty-gritty of Houston's local politics.

For example, the majority below complained that the "strength [of the leading contenders] was not based on the merits of their proposals, [but] on the political power of the men behind them." (A. 5) The portion of Mayor McConn's testimony quoted above was introduced with the district court's comment that "McConn's concern was to keep politically influential groups content" (A. 14 n.5, *quoting* A. 83-84)—without an explanation why that concern should implicate the federal antitrust laws in any way.

The courts below failed to recognize that *Noerr-Pennington* protects precisely the sort of political behavior they found objectionable. In *Noerr*, "each group appears to have utilized all the political powers it could muster" in an attempt to obtain legislative action that would "help it [and] injure the other." 365 U.S. at 145. In *Noerr*, which involved "reprehensible" tactics, *id.*, the Court noted that its holding restored "the true nature of the case—a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income." *Id.* at 144 (footnotes omitted).

B.

Political activity cannot be transubstantiated into an antitrust violation by the lower courts' labelling of the city and the mayor as "conspirators." The district court held *Noerr-Pennington* inapplicable because the public officials went beyond "participation . . . [through] influence in favor of private parties," and reached the level of "actively conspir[ing]" with those parties. (A. 119-20) And the Court of Appeals approved the district court's circular and meaningless instruction to the effect that meetings with and favoring constituents are not

conspiratorial unless part of an illegal arrangement, and conspiracy is what makes it illegal. (A. 22-24 & n.6) Circularity was inevitable, for as courts and commentators have noted (see pp. 9-11, *supra*), circularity inheres in the concept of a "co-conspirator exception."

The very notion of an *antitrust* conspiracy in these circumstances was inapt. An antitrust conspiracy involves joint action that increases the market power of the collaborators beyond that which anyone alone could possess (*e.g.*, rival sellers fix prices); or that allows one party to accomplish an anticompetitive result that cannot be achieved unilaterally (*e.g.*, where a supplier agrees with his dealer on the latter's resale price); or, more generally, where one competitor promises to limit his own future freedom of action in the marketplace (as in a noncompetition agreement) in some manner other than a conventional exchange.[9] None of these core conspiracy ideas has any application to the present case. The "restraint" here was inherent in the city's power under state law, not disputed in this case, to award franchises. If the city prefers collaboration or cooperation among license applicants as a method of allocating a license or franchise, nothing in the antitrust laws forbids it.[10]

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9 The *de facto* limitation on future behavior that results from a conventional exchange, such as a seller's selling the only thing he has to sell, or the buyer buying the only thing he wishes to buy, is obviously not a conspiracy.

10 The decision below thus uses "conspiracy" language to impose a greater duty on a government agency than it would upon private parties. Suppose, for example, that McDonalds receives several applications for franchises in an area, that it regards the applicants as all qualified, that it might award four franchises to one applicant, but that it chooses to award one to each of the applicants and tells them to work out among themselves the prospective franchise locations within the area and who would get each one. The applicants have not engaged in any unlawful conspiracy, for they are implementing the will of the franchisor who is free to grant one or four and to choose which persons he will enfranchise. And certainly the franchisor's actions are not rendered unlawful by labelling him a conspirator.

The city here was completely in control throughout. Indeed, the very theory adopted below was that the city itself "orchestrat[ed]" (A. 117) the situation, but it acted unwisely.

In short, the majority below misused "conspiracy" language to find an *antitrust* restraint in the first instance.

C.

The Fifth Circuit majority's talismanic use of "conspiracy" language was not made any more appropriate by its focus on the level of the officials' political activity, which it found intolerable: "Numerous examples of official involvement in the conspiracy abound, which indicate that the trial court did not err in finding that the co-conspirator exception applied . . . [The] actions of the Mayor and City Council indicate a 'vigorous involvement in orchestrating certain aspects of the conspiracy.' " (A. 24)

None of the opinions below was able to delineate the level of "involvement" beyond which permissible "participation" becomes impermissible "conspiracy." Not only is there no "bright line"; there is no pertinent standard. Indeed, the opinions were unable to articulate why any Sherman Act interest *should* depend on the degree of the officials' involvement.

In holding that some unarticulable degree of participation by government officials will vitiate *Noerr-Pennington* immunity, the decision below only bears out the fears of courts and commentators that the co-conspirator exception would "abrogate"[11] or "swallow"[12] the *Noerr-Pennington* rule. In the field of government regulation and allocation of franchises, substantial interchange and negotiation between the regulator and

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11 *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975).

12 R. Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 Ariz. St. L.J. 279, 300 n.119.

the private parties, or amongst the private parties and the regulator, is common. Often, it is done when the regulators prefer to gain compliance without suit or when, as here, the regulator understands the ability of a frustrated private party to obstruct the regulator's program by suing, organizing referendums, or the like. Here, for example, had the City Council not been responsive to political considerations, and granted a cable franchise on the basis of "objective" technical criteria, a politically powerful loser might well have organized another voter referendum and blocked the award, as happened in 1973. The process would then be back at square one, and the citizens of Houston would remain without cable television. In the face of an easily-activated referendum system, the sensitivity of the Mayor and City Council to political realities may have been the only means promptly to accomplish any cable franchising.

Moreover, as numerous observers of government processes have recognized, legislation (including that in a city council) itself is often the product of close collaboration between interested private parties (and their lobbyists) and elected officials (and their staffs). Legislative action does not result only from unsolicited and unrequited communications to legislators, after which they are convinced of the merit of the position urged and work unaided to further it. The symbiotic give-and-take process that characterizes the drafting of most legislation,[13] core political activity immunized by *Noerr-Pennington*, loses all protection under the Fifth Circuit's application of the co-conspirator exception.

A holding, such as that below, which makes *Noerr-Pennington* immunity dependent upon the degree of official involvement in the private parties' petitioning is thus fundamentally irreconcilable with, and threatens to undo, *Noerr* and *Pennington*.

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13 *See, e.g.*, V.O. Key, *Politics, Parties, & Pressure Groups* at 143-45 (5th Ed. 1964); D. Blaisdell, *American Democracy Under Pressure* at 218 (1957).

D.

The decision below also eviscerates *Noerr-Pennington* and chills private petitioning by making its legality depend upon a hindsight judgment about the wisdom of the public grant, which private petitioners have no way of predicting in advance. Indeed, the decision below would create substantial mischief by transforming federal antitrust courts into general reviewing bodies for the wisdom of state and local government decisions.

For the decision below actually would have federal antitrust courts review, and impose their own ideas of, the proper political behavior of states and municipalities. As explained by the concurrence below,

> the majority opinion ultimately rests on a duty of the city to justify [its action]; political patronage is not justification . . . [No] antitrust liability should result if [the court] decides that the [asserted] advancing of public policy is "legitimate" and outweighs any adverse effect on competition.

(A. 34) (concurring opinion of Judge Higginbotham). *See also* A. 40, where the panel majority opined that "[u]nfortunately, the Mayor did not stop [at favoring minority participation and local ownership in his] manipulation of the cable television franchising process."

The implications of this kind of approach for federalism and for new federal judicial involvement in state and local government affairs are drastic. For example, under the approach below, a federal antitrust court could decide, based on its own notions of legitimate public policy considerations, that minority business groups may petition local government for a franchise with antitrust immunity while similar petitioning by other business organizations subjects them to treble damage liability—or the reverse.

In cases of allocation of licenses and franchises, particularly, it is recognized that there are often no rational grounds for choosing one applicant over another. *See* S. Breyer, *Regulation*

and Its Reform, at 71-74, 95, 159-61 (1982). Surely substantial involvement by the relevant officials in negotiating or structuring the ultimate award or regulation of a license grant cannot appropriately be characterized as an antitrust conspiracy and be reviewed for wisdom by a federal antitrust court. The majority below believed that Houston's mayor and council negotiated or orchestrated unwisely in responding to "political muscle." But such behavior cannot be labelled an *antitrust* conspiracy with the favored persons unless the federal antitrust courts are to become, for the first time, the vehicle for rooting out "political muscle" as a factor in government regulation or allocation. If government officials' consideration of that factor is thought to be wrong, the answer is that "[t]he antitrust laws were never meant to be a panacea for all wrongs." *Parmalee Trans. Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

The manner in which Houston politicians made their decision here may not have conformed to civics textbook notions, or economists' models, of local legislators impartially deciding what is best for all of the people. But *Noerr* rejects the notion that an antitrust court may impose any idealized political model upon state and local governments. Nor has federal law adopted the preferences of economists for particular methods of government allocation of such franchises or licenses as railroads, telephones, ambulance services, or broadcast facilities. Other statutes punish political activity deemed to be beyond acceptable bounds.[14] As evidenced by Affiliated's own conduct (*supra*, p. 5), political pressure tactics are part and parcel of legislative and executive decisionmaking.[15] It is left to the electorate to turn out of office those politicians whose

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14 Texas, for example, has a number of laws addressed to illegally influencing government officials. *See Tex. Penal Code Ann.* § 36.02 (bribery), § 36.03 (coercion of public servant), §§ 36.08, 36.09 (gifts to public servants) (Vernon 1974).

15 *See, e.g.*, D. Truman, *The Governmental Process: Political Interests and Public Opinion* at 4-8 (2d Ed. 1971); L. Milbrath, *The Washington Lobbyists* at 12 (1963); *The Federalist* No. 10 at 131 (J. Madison) (John Harvard Library Ed. 1961).

representation is unsatisfactory, as indeed Mayor McConn was turned out in 1981.

E.

The decision below is certain to stimulate new antitrust litigation, and federal courts' intrusion into government processes, that *Noerr-Pennington* sought to halt. The multimillion dollar jury award below will be a beacon for antitrust suits against both private parties and governments by disappointed vendors, license applicants, and unhappy litigants before zoning boards.[16] Successful applicants for government franchises, and the government officials making the grants, will be particular targets of such suits since, as noted, franchise awards typically involve extensive interchange between officials and applicants, and since any award tends to leave some disappointed applicants in its wake.

The decision below encourages antitrust plaintiffs to flood state or local government offices with document demands and deposition notices in an effort to build up the officials' "involvement," and to try to show that their decisions were colored by considerations of political clout, so as to meet the Fifth Circuit's test of official "conspiracy."

To forestall these serious consequences, this Court should review the Fifth Circuit's misapplication of the "co-conspirator exception" to *Noerr-Pennington*.

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16 The recently enacted Local Government Antitrust Act of 1984, Pub. L. No. 98-544, will not solve the many problems created by the decision below. The Act extends antitrust immunity to local governments, and those acting under their direction, but only to the same extent such activity was immune under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. All private petitioning protected by *Noerr-Pennington* but not by the "state action" doctrine remains unaffected by the new statute and hence vulnerable to the Fifth Circuit's co-conspirator exception. And, in any event, the Act does not bar suits for injunctive or declaratory relief. Moreover, there may be as much basis to argue that there is a "co-conspirator exception" to *Parker* immunity as there is to *Noerr* immunity. See *Parker*, 317 U.S. at 351-52. Thus, state and local governments, like private parties, remain at treble-damage peril under the Fifth Circuit's decision.

Conclusion

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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